82-1798

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LOUIS E. DRIGGERS, et al.,

Petitioners,

v.

SOUTHERN COOPERATIVE DEVELOPMENT FUND, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 29, 1983

QUESTIONS PRESENTED

1. Whether a landowner may bring an action under 42 U.S.C. §1983 claiming a violation of substantive due process while foregoing remedies available under state law, when a local government denies his subdivision plat.

2. Whether the court below erred in refusing to review a subdivision regulation decision under the traditional "arbitrary and capricious" standard used in review of zoning decisions.

LIST OF PARTIES

The petitioners in this case are Louis E. Driggers, L. H. Fortson, Jr., Patricia M. Glass, Claude E. McGavic, and Lamar S. Parrish, individually and as Commissioners of Manatee County; Manatee County Board of County Commissioners; and Manatee County, Florida. The respondents are Southern Cooperative Development Fund, Inc., Small Farm Development Corporation, Manatee County Community Development Corporation, and Herman L. Rutledge.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Court which appears in the Appendix hereto (App.) (at A-1, infra), is reported at 696 F.2d 1347 (11th Cir. 1983). The opinion of the United States District Court for the Middle District of Florida which appears in the Appendix hereto (at A-28, infra), is reported at 527 F. Supp. 927 (M.D. Fla. 1981).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 4, 1983. A timely petition for rehearing en banc and petition for rehearing before the panel was denied on March 23, 1983. This petition for writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Title 42 United States Code, §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Southern Cooperative Development Fund, Inc. (SCDF) applied for and was denied approval of a preliminary subdivision plat in May 1980 by the Board of County Commissioners of Manatee County. Southern Cooperative Development Fund, Inc. v. Driggers, 696 F.2d 1347 (11th Cir. 1983); (App. at A-6). SCDF challenged the denial as a violation of federal and state substantive due process and equal protection guarantees, and brought suit under 42 U.S.C. §1983 in the United States District Court for the Middle District of Florida. (App. at A-1-2). After a hearing on a motion for partial summary judgment directed solely to the due process counts, the district court ordered the Commissioners to reconsider the plat application and to make specific written statements of findings (App. at A-36). The Commissioners upon reconsideration denied the plat application, finding that the application did not meet county subdivision regulations or the requirements of certain state statutes. (App. at A-7). The district court entered summary judgment for SCDF, finding that the subdivision plat met the requirements of the county's subdivision regulations; that the state statutes relied on by the county were not independent authority for county subdivision review; that the county failed to show that its actions were not arbi-

trary and capricious; and that therefore SCDF's constitutional due process rights were violated. (App. at A-28).

On appeal by the county, the Court of Appeals for the Eleventh Circuit held that the plat complied with local subdivision regulations and that therefore the county had an administrative duty under Florida law to approve the plat. (App. at A-27). The county's denial of the plat was thus found to be a violation of SCDF's due process rights, and the district court decision was affirmed. (App. at A-27).

REASONS FOR GRANTING THE WRIT

1. The decision is in conflict with Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982), cert. denied, 103 S.Ct. 345 (1982), where the court found that the denial of a subdivision plat was not of sufficient constitutional proportions to raise a claim under §1983.

The well-considered opinion of the First Circuit in Creative Environments, supra, illustrates the concern with which that court has approached the issue of the scope of §1983 in these circumstances, as contrasted with the Eleventh Circuit. In Creative Environments, the First Circuit found that the denial of a subdivision plat through the misapplication of state law was not the kind of substantive due process viola-

tion intended to be included within the reach of §1983. The First Circuit relied on the principle established by Screws v. United States, 325 U.S. 91 (1945) and Snowden v. Hughes, 321 U.S. 1 (1944), that the violation of a state or local law does not automatically give rise to a violation of rights secured by the Constitution, and found that this "run of the mill" local land development dispute did not warrant recognition of a federal constitutional question.

In Creative Environments, the developer applied for subdivision plan approval with the town Planning Board, the decision making body for subdivision approvals. The Board first disapproved the plan, then approved the plan with conditions unacceptable to the developer. 680 F.2d at 827. The Planning Board decision was challenged as being outside the authority of the state subdivision law, and as being decided according to vague and subjective standards. The district court granted summary judgment for the town, and the developer appealed. 680 F.2d at 823. The First Circuit assumed, for purposes of the review of summary judgment, that the town engaged in "arbitrary tactics" to frustrate the subdivision development. Nevertheless, the court found that the Board's actions did not rise "to the level of a violation of the Constitution of the United States." 680 F.2d at 829. The Court stated:

> even if it could here be shown that the Board members strayed wilfully from "the proper ends of their governmental duties," their digression was not of "constitutional proportions."

680 F.2d at 832, n. 9.

An important factor in the First Circuit opinion was the existence of an adequate state remedy to redress any alleged property damage in the ordinary land use proceeding. In this regard the court referred to Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt, this Court looked to whether state remedies provided adequate redress for property deprivation to determine if actions implicated the Fourteenth Amendment, and found that the plaintiff did not suffer a constitutional deprivation. Similarly, the First Circuit found that there appeared to be adequate state remedies to vindicate the developer's claim without resort to federal court. 680 F.2d at 833. The court expressed a concern that in broadening the scope of §1983 to include subdivision regulation disputes,

> ...any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to federal court...

680 F.2d at 831. (emphasis added).

Even where a due process claim may be made out, the First Circuit advised that abstention may be appropriate

where, as here, the state has a peculiar interest in the matter and the dispute is of a conventional nature. 680 F.2d at 834, n. 11. The court concluded that

> the conventional planning dispute....is a matter primarily of concern to the state and does not implicate the Constitution.... A federal court, after all, "should not....sit as a zoning board of appeals."

680 F.2d 833, citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

The approach taken by the Eleventh Circuit to the remedy provided by §1983 is entirely different from that of the First Circuit. The developers in the instant case applied for and were denied subdivision plat approval, and immediately brought suit challenging the county's denial as beyond its regulatory authority. The court awarded summary judgment on the basis that the county commission had an administrative duty to approve the proposed plat. Without comment or apparent consideration of the scope of the federal remedy under §1983, the Eleventh Circuit simply found a violation of plaintiffs' guarantee of due process, thereby affirming the judgment for the developers on the §1983 count.

The county argued below that this case involved a local "garden variety land use decision," fully reviewable under state law, which did not merit scrutiny under federal constitutional

due process review. However, the Eleventh Circuit ignored the presence of an adequate state remedy for the redress of alleged property rights violation and, further, refused to review the local action under the "arbitrary and capricious" standard, the traditional standard for land use regulation. As a result, the decision invites a host of conventional planning disputes into the federal courts under the ticket of a §1983 claim.

The conflict between the circuits regarding the proper scope of §1983 in a local land use decision could not be more starkly contrasted than by these two decisions based on similar circumstances. The trivialization of the federal protection afforded under §1983 has wisely been rejected by the First Circuit in Creative Environments. Because the approach of the Eleventh Circuit, in contrast, presents the unintended and unwise alternative of broad, virtually unbridled use of §1983 for a variety of local government actions, the Court should grant a writ of certiorari to more properly define the scope of §1983.

2. Local Government subdivision legislation decisions must be reviewed, like zoning decisions, under the "arbitrary and capricious" standard.

The Eleventh Circuit expressly refused to review the case below under the "arbitrary and capricious" standard, the traditional test for review of alleged due process violations in land use matters. Subdivision regulation, like zoning, is a pervasive and important technique by which local governments control the use and development of land. Such regulation frequently requires local governments to weigh important policies in the process of reviewing subdivision applications. Like zoning decisions, subdivision decisions are particularly suited to the province of local elected officials acting under state authority. For these reasons local government subdivision regulation decisions should be reviewed under the same standard as zoning decisions.

The importance of subdivision control to the future development of the community is equivalent to that of zoning, and perhaps even more critical. As explained by Norman Williams

> In the history of any built-up area, the most important single point in its development is the time when what was originally open land (field or forest) was divided into small parcels for some more intensive use, either urban or suburban. This is the period when its subsequent pattern and appearance are set, usually permanently. Before this, the existing open use of land had relatively little impact upon the area surrounding it, and no more impact upon the operation of local government. After subdivision of the land, the chances are that the new use would have much greater

> impact, both on the adjacent land and upon a larger area.
>
> ...For these reasons American municipalities have long exerted substantial control over the process of land development, at the moment of subdivision.

5 N. Williams, American Land Planning Law §156.01 (1975). See also E. C. Yokley, The Law of Subdivisions, §39 at 157 (2d ed. 1981). State courts have recognized the increased importance of subdivision regulation to local government's ability to manage growth and development. See e.g., Mansfield & Swett, v. Town of West Orange, 120 N.J.L. 145, 198 A. 225 (1938); Town of Sun Prairie v. Storms, 327 N.W.2d 642 (Wis. 1983); Shoptaugh v. Board of County Commissioners of El Paso County, 543 P.2d 524 (Colo. Ct. App. 1975); Oakes Construction Co. v. City of Iowa City, 304 N.W.2d 797 (Iowa 1981).

Manatee County detailed the reasons for denying SCDF's subdivision plat application in its order of August 11, 1981. (App. at A-7-8). The order clearly sets forward the county's concerns about the public facility and services problems that would be generated by the proposed development. The county's ability to manage growth and development was and remains of critical importance in this dispute.

The federal courts have long recognized the particular interest that states have in zoning decisions and thus have

applied a review standard that asks if a zoning decision is "arbitrary and capricious." Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Agins v. City of Tiburon, 447 U.S. 255 (1980). Only where fundamental rights are involved has the court stepped into the dispute to apply a stricter standard of review. See, e.g. Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) (rights of association); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (equal protection). Subdivision regulation should be treated in the same manner. Indeed, the First Circuit in Creative Environments suggested that an exception to the court's narrow use of §1983 in local administrative actions might be justified in cases of gross abuse of power or invidious discrimination, or where recognized fundamental constitutional rights are abridged. 680 F.2d at 832. Such cases would involve claims of equal protection violations such as that involving racial animus.

In the opinion below, it is clear that the court accepted racial motiviations as a given, which in turn influenced the court's scrutiny of the case.[1/] The County denied any viola-

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1/ For example, the opinion states that "many members of the all-white community complained that the participants (continued)

tions of equal protection in its Answer (R. 45). Although the case was heard on the plaintiffs' own motion for summary judgment in a due process count, and a contested equal protection count was held in abeyance, the court improperly accepted plaintiffs' unproven allegation that racial animus was a motivating factor in the local decision.[2/] Such a consideration by the court is inappropriate and highly prejudicial in the context of a motion for summary judgment where, as here, allegations regarding racial motivations have not been admitted by the County, established by undisputed evidence, or even tried. It is particularly inappropriate where a due process count is being heard, and the allegations concern a land use matter.

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in the FFC program would be low-income blacks and Spanish-Americans...," (App. at A-5), (emphasis added) while in fact the county was not proven to be an "all white community" and the transcript of the meeting described in the opinion does not show that citizen participants made any mention of low-income blacks and Spanish Americans. The record indeed shows that Manatee County is a racially mixed community. See, e.g., Deposition of McGavic, August 28, 1980 at 141-142, (R. 23); Deposition of Louis E. Driggers, August 20, 1980 at 145 (R. 22), relevant portions of which are attached in the Appendix, infra, at A-41,-42.

2/ SCDF's Appeal Brief cites two instances during the meeting where citizens made "comments of a racial nature." Appellees' Brief at 8. Those comments, making passing reference to minorities, are contained in the parts of the transcript attached in the Appendix, infra, at A-40. They can hardly be considered to establish that racial animus was an official motivation.

Federal review of subdivision decisions should be reviewed under the traditional land use standard for due process violations, except where actions involve fundamental rights. This case, like the majority of subdivision disputes, is not one of those types of cases, and should have been reviewed under the "arbitrary and capricious" test.

3. The decision raises a question of substantial importance to local governments, developers and to the federal courts regarding the proper scope of substantive due process review of local development decisions under §1983.

Subdivision regulation has enjoyed widespread use as a local land use tool. According to the International City Managers' Association, the great majority of counties in the United States have adopted subdivision regulations. For example, 92% of all counties over one million population have adopted regulations, as have 67% of the smallest counties under 2500 population.[3/] The courts will be flooded with litigation resulting from subdivision regulation should every governing body's subdivision decisions be reviewable as alleged substantive due process violations under §1983. Therefore, it is important that the court more narrowly define the scope of

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3/ County Functions and Services for All Counties: 1976, ICMA County Yearbook 104-151 (1977).

the §1983 remedy to preserve that remedy for the more substantive federal questions for which the statute was originally intended.

Because subdivision regulation impacts both the interests of the general community and the developer or landowners of the subdivision itself, conflicts and disputes among those parties are a normal part of the process for deciding a subdivision application. Those conflicts and disputes should not be matters for federal review in the absence of an overriding substantive constitutional question, or "virtually every legal or procedural error of a local planning authority or zoning board of appeal could be brought to the federal court." Creative Environments, supra, at 831.

In Parratt v. Taylor, supra, the court expressed a concern about the large and increasing number of cases brought to the attention of the federal courts under §1983 in the last few years. Justice Powell's concurring opinion notes that between 1961 to 1979, federal filings under §1983, not including prison inmate suits, increased from several hundred to thirteen thousand per year. Statistics from the administrative offices of the United States Courts demonstrate the continuation of this trend. In 1982, the number of §1983 cases, not including

prison inmate suits, had increased to 17,028.[4/] Part of this increase in litigation under §1983 can be attributed to the availability of attorney's fees for prevailing parties. The greater potential for municipal and state liability since the case of Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) has also been a subject of Congressional concerns. See Municipal Liability Under 42 U.S.C. 1983: Hearings before the Subcommittee on the Constitution of the Comm. on the Judiciary United States Senate, 97th Cong., 1st Sess. (1981). The number of cases threatens only to grow, while the substantive importance of those cases threatens to diminish, should the type of case represented by the ordinary subdivision plat denial be subject to the constitutional scrutiny represented by this case.

4/ Administrative Office of the United States Courts, 1982 Annual Report of the Director, Appendix Table C2, 216 (1982).

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals, insofar as it affirmed the granting of partial summary judgment, should be reversed.

Respectfully submitted,

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April 29, 1983

Appendix

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APPENDIX A

SOUTHERN COOPERATIVE DEVELOPMENT FUND, et al., Plaintiffs-Appellees,

v.

LOUIS E. DRIGGERS, et al., Defendants-Appellants.

NO. 82-5305.

United States Court of Appeals, Eleventh Circuit.

Feb. 4, 1983.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and JOHNSON, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

This is an appeal from a summary judgment, 527 F. Supp. 927, entered in favor of the plaintiffs on two counts which alleged that the defendants, Manatee Board of County Commissioners, Manatee County, and individual County Commissioners, abridged plaintiffs' rights to due process in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the United

States Constitution (Count 1), and plaintiffs' rights to due process under the Florida Constitution (Count 4), in refusing to approve a preliminary subdivision plat. The court granted an injunction and directed the defendants to issue the plat to the plaintiffs. The defendants assign error in the court's findings that the applicable regulations had been complied with and that they therefore violated an administrative duty to approve the plat; that there were no genuine issues of material fact that precluded the entry of summary judgment; and that the denial of the plaintiffs' application was arbitrary and capricious. We affirm.

Plaintiffs Southern Cooperative Development Fund, Inc. (SCDF), Small Farm Development Corporation (SFDC), and Manatee County Community Development Corporation are associated with a joint private-public program called the Family Farm Cooperative Program (FFC Program) whose purpose is to foster the creation and development of agricultural cooperative communities as a means of addressing rural poverty by making it possible for low-income and disadvantaged persons interested in agriculture to own and operate small family farms. The program is funded by a combination of government grants and low-interest loans, private sector loans, and internally generated revenues. Plaintiff Rutledge is

a resident of Manatee County who applied for and was eligible to participate in the FFC Program.

In 1979 SCDF purchased a 1631 acre tract of land near the Myakka-Wauchula Road, approximately six miles from the unincorporated town of Myakka and twenty five miles from the city of Bradenton, Florida. The property is in the unincorporated area of East Manatee County and is zoned for agricultural use. The SFDC representatives contacted officials of the Manatee County Planning Department, the county agency principally responsible for land planning and development, to discuss the establishment of the agricultural cooperative and to determine what county requirements would apply to the project. The Planning Department advised SFDC that it would be necessary to prepare a subdivision plat and obtain approval of the Manatee County's Board of County Commissioners in accordance with Manatee County's Subdivision Regulations.

Under the Subdivision Regulations a developer must submit pre-application plans for review with the Planning Department, the Health Department, the Highway and Engineering Department, and the Utility System, prior to making an application for subdivision approval. Plaintiffs prepared and submitted a detailed pre-application plan describ-

ing the proposed agricultural community. They subsequently received permission from the Planning Department to submit an application for preliminary plat approval. A plat application, titled the Long Creek Subdivision, was submitted on February 1, 1980, and showed a subdivision of 49 ten-acre tracts, 4 one-acre tracts, and two tracts larger than 460 acres. As a result of discussions with the county staff and agencies, plaintiffs agreed to modify the design of some streets within the subdivision and to improve a portion of the Myakka-Wauchula County Road abutting plaintiff's property. They also agreed to change dead-end streets to cul-de-sacs and established setbacks for a power line easement. A revised plat reflecting the changes was submitted on February 29, 1980. As required by the Subdivision Regulations, the Highway and Engineering Department, the Health Department, and the Utility System reviewed the application for "conformity with all County regulations" and expressed no objections. The Planning Department, as required, recommended to the Manatee County Planning Commission (a public board appointed to advise the Commission on subdivision and zoning matters) that preliminary plat approval be granted, noting that the Long Creek Subdivision "meets all requirements of preliminary plat review" and that the other county departments had

"no objections to the preliminary plat." The Planning Commission recommended to the County Commission that the plat be approved. Notwithstanding its compliance with all relevant county ordinances, SFDC's project was a subject of dissent among residents of Manatee County. At the first meeting of the Commission on the Long Creek Subdivision application on March 29, 1980, many members of the all-white community complained that the participants in the FFC program would be low-income blacks and Spanish-Americans and that the program was a federal "give away." During the hearing Commissioner Driggers wanted to consider factors other than compliance with the Subdivision Regulations because although the plat complied with the regulations he felt that this was not a "normal" subdivision. Rather than approve the plat, the Commission directed the Planning Department to undertake an additional study of the Long Creek Subdivision. This was accomplished and the Planning Department once again concluded that the SFDC's plat application complied with the Subdivision Regulations.1/ This report was submitted to each Commissoner before the May 1 hearing and noted that the

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1/ An impact analysis which dealt with matters not included in the Subdivision Regulations such as school administration, medical services, and road conditions was also submitted to the Commission.

"Long Creek Subdivision appears to meet all requirements of the Manatee County Zoning Ordinances and Subdivision Regulations..." On May 1, 1980 the Commission voted unanimously to disapprove the plat. Although Section 23 of the Manatee County Planning Act expressly requires the Commission to publicly state its reason for disapproval of the plat, neither the Commission nor any of the Commissioners gave any reason for disapproving the plat.

Plaintiffs filed suit on May 30, 1980 and undertook discovery. Depositions of the Commissioners established that the Commission accepted the fact that the plat complied with the County's Subdivision Regulations. Plaintiffs filed a motion for partial summary judgment. The defendants did not controvert the fact of SFDC's compliance with the Subdivision Regulations.

On July 2, 1981 the district court entered an order finding that only factors contained in the Subdivision Regulations could constitute grounds for denial of the plat application, and since the Commission had failed to state reasons for its May 1, 1980 denial, the district court directed that "the County Commission should be and is afforded the opportunity to again consider Plaintiffs' plat application within the guidelines set forth above (the Subdivision Regulations 'enacted pursuant to

the Manatee County Planning Act, Chapter 63-1559 ... which is attached ... as Exhibit B')." These were the Subdivision Regulations in effect at the time that the plat application and the suit were filed.

On August 11, 1981 the Commission again considered the plaintiffs' plat application. At the meeting the commissioners remained silent on the merits of the application. The conclusions of the Planning Department in their new review of the application were similar to those found in the first staff report in regard to the public facilities problem. After comments by the planning staff, plaintiffs' counsel, and an attorney representing local residents, the Commission proceeded immediately to vote unanimously against the subdivision. The Commission then instructed their legal staff to prepare a written order of their decision. Shortly thereafter, the attorney representing the County in this litigation returned to the meeting with the order denying preliminary plat approval.[2/] The order made findings of fact that the road access to the proposed subdivi-

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2/ Since none of the Commissioners expressed reasons at the hearing, and since under the Florida "Sunshine Law," Fla. Stat. Ann. §286.011 commissioners may only discuss official business in public meetings, it is clear that the Order was not prepared by the Commission, but was apparently prepared by counsel in anticipation of this litigation.

sion would be unsafe and inadequate; that public school facilities made necessary by the proposed development were not available and were not planned to be constructed; that necessary public or private facilities and sewers were inadequate; that there was no proximity to recreation and shopping facilities and schools and the extra traffic could not be handled safely; and that the proposed subdivision would constitute urban sprawl.3/

3/ The Order contained the following findings of fact:

1. The only road that provides access to the proposed subdivision is Wyakka-Wauchula Road, otherwise known as Nine-foot Road. For a distance approximately two miles to the south of the property and five miles to the north of the property this road is less than one standard lane in width, consisting only of patches of asphalt some eight to twelve feet wide. For the reasons stated in the staff report, the Board finds that the road access to the proposed subdivision would be unsafe and inadequate.

2. The proposed subdivision would add between sixty (60) and seventy (70) students in grades 2-8 to a school having an enrollment of two hundred fifty-two (252) and a capacity of two hundred seventy-five (275). Funds are not currently available to expand the school. For the reasons stated in the staff report, the Board finds that public school facilities made necessary by the proposed development are not available in the area which is proposed for development and are not planned to be constructed in the area concurrently with the development.

3. Because of the extremely remote location of the proposed subdivision and the facts set forth in the staff report, the Board finds that the following necessary public or private facilities and services are inadequate:

(continued)

Based on these findings the Commissioners determined that the application did not meet either the requirements of the Subdivision Regulations in effect at the time of the initial consideration of the application on May 1, 1980, or the requirements of the Development Code.[4/] The Commissioners further determined that the proposed plat would be in violation of Section 336.05(2) of the Florida Statutes which, they argue,

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(a) emergency medical services;
(b) fire protection;
(c) law enforcement;
(d) traffic circulation;
(e) education.

4. The Board finds that the proposed subdivision is not located in close proximity to neighborhood recreation and shopping facilities and schools; is not designed to have convenient and easy access to highways, arterial streets, and major collector streets with direct connections to major recreation, shopping and working areas; and is not located where necessary transportation facilities are adequate to handle the expected additional traffic safely.

5. The Board finds that the proposed subdivision would constitute urban sprawl, would be located in the eastern portions of the East County sector where public services can least easily be provided and would create a "leap frog" pattern of development.

4/ The current subdivision regulations are part of the Manatee County Comprehensive Zoning and Land Development Code adopted April, 1981 pursuant to state law which requires the county to adopt a comprehensive plan prior to July 1, 1979. All regulatons thereafter are required to be consistent with the comprehensive plan. The Florida Local Government Comprehensive Planning Act of 1975 §§163.3161 et seq., Florida Statutes (1981).

authorizes a county commission to reject a plat if road access is not adequate or safe, and in violation of Section 235.193, Florida Statutes, which, they argue, authorizes denial of a subdivision application if public school facilities are not available or will not be made available concurrent with development. Finally, the Commissioners decided that the subdivision was not consistent with the Manatee County Local Government Comprehensive Plan.

On December 3, 1981, following the Commission's second denial of SFDC's plat, the district court granted plaintiffs' motion for summary judgment on Counts 1 and 4, entered declaratory judgment for plaintiffs and ordered Manatee County to approve the plat. The defendants' cross-motion for summary judgment on those counts was denied. The district court granted a stay pending appeal of its injunction.

The issues are sharply drawn. The defendants contend that the board's denial of the plat application was justified under the Subdivision Regulations in effect at the time the application was filed; was justified under the provisions of the Development Code, enacted after the plaintiffs' plat application had been filed and after this litigation had been instituted; and was justified under the provisions of Florida

Statutes, Section 336.05(2),[5] relating to the inadequacy of road access, and Section 235.193,[6] relating to the inadequacy of schools.

The plaintiffs contend that since Manatee County enacted detailed and comprehensive Subdivision Regulations with which plaintiffs complied, the Commission had no discretion to disapprove the plat for reasons not contained in the Subdivision Regulations, nor could their disapproval be based upon the later enacted Development Code.

To put the case in proper perspective, we must, at the outset, reject the defendants' argument that this case involves a challenge to local land use laws, and therefore the standard enunciated in Euclid v. Ambler Realty Co., 272 U.S. 365, 47

5/ Section 336.05(2), Florida Statutes provides that:

"The Commissioners are authorized to refuse to approve for recording any map or plat of a subdivision when recording of such plat would result in duplication of names and streets or roads or when said plat, in the opinion of said Commissioners, will not provide adequate and safe access or drainage."

6/ Section 235.193, Florida Statutes, provides that:

"(4) The local governing body is empowered to reject development plans when public school facilities made necessary by the proposed development are not available in the area which is proposed for development or are not planned to be constructed in such area concurrently with the development."

S.Ct. 114, 71 L.Ed. 303 (1926) should apply, i.e., whether the action of the Commission was arbitrary and capricious. The plaintiffs do not challenge the exercise of legislative function by Manatee County, or the validity or legality of the zoning ordinances. On the contrary, the plaintiffs urge that the Subdivision Regulations be applied as written. What we are called upon to decide is whether the Commission's actions were authorized as a matter of Florida law, and if so whether their actions were in violation of the Due Process clause of the Fourteenth Amendment.

The district court held that "Manatee County must base its approval or disapproval of plat applications upon the regulations and requirements contained in the Subdivision Regulations, and not upon any broad powers of discretion. As such, the County Commission does indeed act in an administrative, and not a discretionary, capacity." Defendants take issue with this holding. They argue that even assuming that only the Subdivision Regulations in effect at the time of the initial application apply, under Florida law the regulations of subdivisions require the use of reasonable discretion by the Commission in the application of standards and requirements to the specific circumstances of the subdivision application. They

point to the preamble to the Subdivision Regulations[7/] as authority for the position that prefatory language reserving discretion to provide for the general health, safety and welfare was sufficient to sustain their action. We disagree. The preamble contains no standards with respect to subdivision approval. It merely sets forth the underlying purpose for enacting the Subdivision Regulations. The language in the preamble cannot serve as an independent source of authority for disapproving plats. This would permit the Commission to hold in reserve unpublished requirements capable of general application for occasional use as the Commission deems desirable.

Defendants also rely on an access requirement in the Subdivision Regulation which provides: "No subdivision shall be approved unless its street system is connected to an arterial highway by a public road which is county or state maintained." It is undisputed that the proposed plat satisfied this

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7/ The Subdivision Regulations prefatory statement of the public purposes of the regulations, states in part, "... to provide for the harmonious development of the county ... [and] to insure that each new residential subdivision results in an attractive living environment, which will maintain its value over the years." Further, that its purpose is "to secure adequate provision for light, air, open space, recreation, transportation, potable water, flood prevention, drainage, sewers and other sanitary facilities."

requirement since the subdivision connected to a county road, which in turn connected with an arterial highway. But the defendants contend that this is not enough. They base their discretion, they say, to deny this plat application because the Myakka-Wauchula county road was in such poor condition that it did not fulfill the minimum standards of design and maintenance. We think it is clear, however, that the defendants cannot impose ad hoc requirements regarding the condition of country roads adjacent to proposed subdivisions in order to implement the purpose of the Subdivision Regulations.

We agree with the district court that Broward County v. Narco Realty, 359 So.2d 509 (Fla. App. 1978) enunciated the principle of Florida law that is controlling here. In that case even though Narco had complied with all of the legal requirements for platting its land, the Commission contended that it still had the discretion to approve or to refuse approval of any plat. The court rejected this argument saying:

> All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise the official approval of a plat application would depend upon the whim or caprice of the public body involved.
>
> ...the property owner has done all the law required of him to entitle his plat to be recorded. At that point any discretion in the County Commission vanished.

Defendants maintain however that Narco must be read narrowly because the only principle that it established was that where a local governmental body stipulates that all legal requirements of the plat approval process are met, there is no discretion in the Commission. But it did not establish the principle that a Commission's action in reviewing a plat application is ministerial instead of discretionary in nature. We are unimpressed with this argument. Here the Commissioners admitted that the plat complied with the Subdivision Regulations and the case is therefore in the same factual posture as Narco. To argue that there is a difference between compliance with subdivision requirements established by stipulation in Narco vis-a-vis by an uncontroverted showing sub judice, is a bit of hyperbole in which we will not indulge.

Defendants further submit that Narco has been misinterpreted because Garvin v. Baker, 59 So.2d 360 (Fla. 1952), State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173 (Fla. App. 1973), and Broward County v. Coral Ridge Properties, 408 So.2d 625 (Fla. App. 1981) established the principle that the Commission had discretion in reviewing the Long Creek Subdivision plat application. An analysis of these cases fails to support the defendants' assertion that the plat approval process is discretionary in nature. In Garvin, the

Commissioners denied approval of the plat because the streets were not sixty feet in width and the lots were too shallow. The city's ordinance required the streets to conform as nearly as practicable to existing streets and in no event should they be less than fifty feet[8/]. Plaintiffs' proposed plat indicated street widths of 50 feet, where existing streets in the area were 60 feet wide. There was no ordinance concerning the depths of lots. The trial court held that it was proper to reject the plat on the basis of the ordinance governing street widths, but that it was improper to reject it on the basis of lot depths since this was not covered by the ordinance. It is pertinent to note that the court said:

> Should the city desire to effectuate some sound public policy within its authority, this should be done by duly enated ordinances setting up standards to guide a citizen in carrying on his affairs. Otherwise a citizen could act only subject to the unknown and uncertain views of a public

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8/ The controlling Lake Worth ordinance read:

> Section 2: Said land shall be so subdivided and platted or mapped so that the proposed streets or public ways shall conform as nearly as practicable to existing streets and public ways, in proximity to such tract of land.
>
> Section 4: As a minimum requirement for streets, avenues and sidewalks, the plat shall dedicate a width of at least fifty feet, being at least six feet on each side thereof for sidewalks and at least thirty-eight feet intervening between sidewalks.

official or several public officials, as experienced from time to time.

Id. at 362. The Florida Supreme Court affirmed noting that the lower court passed "upon the authority of the City by ordinance to require streets to be conformable as nearly as practicable to existing streets. The court held that the City had not abused its discretion in requiring the streets shown upon the plat to have a width of sixty feet in conformity with other streets with which it connected. There was no error in this finding..." The defendants argue that this holding means that the board had discretion in reviewing the plat application because it required a sixty-foot street width when the ordinance's language only required a fifty-foot width, ergo, if the board had no discretion in the plat approval process the court would have issued the writ, since the board denied the plat because the streets did not have sixty-foot widths. This argument misses the mark for two reason. Plainly the language in the ordinance in question was in the disjunctive - it required a minimum of fifty-foot width or that the proposed streets conform as nearly as practicable to existing streets. Moreover, the "discretion" that the court was talking about was with respect to that exercised in enacting an ordinance for a valid purpose, not a discretion in the application of the ordinance. "It requires no citation of authority to establish the

fact that a wide street changing into a narrow street, or a narrow street changing into a wide street, constitutes a hazardous traffic condition....the changing of the width of streets and roads involves the public welfare and safety to a high degree, and public authorities having jurisdiction of such matters have a duty to perform in order to protect the public from hazardous and dangerous traffic conditions." Id. at 362.

Defendants' reliance on Zuckerman gives us little pause. A writ of mandamus filed by a developer to compel issuance of a plat approval was denied because at the time the city had not reviewed the plat or taken action since the developer's compliance with the applicable subdivision regulations were unresolved through no fault of the city. Moreover, in Narco the same court took pains to distinguish Zuckerman noting that in that case there were unresolved questions whether the plan met the zoning requirements. To make certain that Zuckerman did not impinge on the principles set forth in Narco the court added, "There are some rather broad statements in Zuckerman, which might lead one to conclude that mandamus never lies to require approval of a plat. While Zuckerman is clearly correct on its facts, to the extent that it might be interpreted to hold that mandamus will never lie to require approval of a plat we recede therefrom." 359 So. 2d at 511.

The exercise of discretion and judgment about which the court spoke is to determine whether a plan meets the zoning requirements. It is not a discretion to approve or disapprove a plan that does meet the requirements.

Defendants' reliance on Coral Ridge Properties is also misplaced. Narco was cited with approval, but mandamus was found not to be an appropriate remedy because the county contended that even though there was compliance with the requirements for filing a plat, nevertheless lack of access, in violation of Section 336.05(2), Florida Statutes, was an additional requirement that had not been met. The property owner disagreed that the statutory requirements were applicable. The court found that whether the county had misapplied or misapprehended the legal requirements for plat approval, i.e., whether in addition to the plat requirements the statute could be invoked, was a question properly dealt with by review because a merely erroneous decision would not support an application for mandamus. Plainly, Narco is neither overruled nor limited by Coral Ridge Properties.

Defendants next assert that the Development Code, adopted April 30, 1981, after the rejection of plaintiffs' plat application on May 1, 1980 and after this litigation commenced, applies to the plaintiffs' plat application because it

was the law existing at the time of the Commissioners' second decision of August 11, 1981. In its order of July 2, 1981 the district court made preliminary findings that the plaintiffs had apparently complied with all of the Subdivision Regulations and held that "Manatee County must base its approval or disapproval of plat applications upon the regulations and requirements contained in the Subdivision Regulations..." The court also found that the county had not specifically stated the reasons for disapproval of the plat application as required by the Manatee County Planning Act, and stated, "Because the County Commission did not articulate its reasons for disapproving plaintiffs' application, and because it does indeed appear from the record that the disapproval may have been based upon criteria not contained in the Subdivision Regulations, the County Commission should be and is afforded the opportunity to again consider plaintiffs' plat application within the guidelines set forth above." (Emphasis added).

In its final order the court found that "the plaintiffs' rights would be violated if new regulations are used to deny a plat application which complied with the regulations in effect at the time the plat application was filed." The court then proceeded to again review the county's rejection of the plat

under the Subdivision Regulations and refused to consider the applicability of the Development Code.

The defendants point out that the Development Code was adopted not to defeat this litigation but was made necessary by the Requirements of the Florida Local Government Comprehension [sic] Planning Act of 1975, Chapter 163.3161 et seq., Florida Statutes (1981), known as LGCPA, which mandates that all local governments in Florida adopt comprehensive plans not later than July 1, 1981. Subdivision Regulations enacted or amended must be consistent with the adopted comprehensive plan. There is no question that plaintiffs' plat application does not meet the requirements of the new Development Code. It follows, defendants argue, that the land use ordinance can be amended during the pendency of a controversy, and that the controversy must then be determined on the basis of the amended law. See State Etc. v. Oyster Bay Estates, Inc., 384 So.2d 891 (Fla.App. 1980); Lelekis v. Liles, 240 So.2d 478 (Fla. 1970); City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954). As we see it, however, these cases simply declined to apply the law of equitable estoppel when there was an absence of a factual basis for its application, a principle that is not open to question. But this line of authorities is inapposite here for several reasons.

First, we have a finding by the district court (with which we agree) that the prior denial or delaying action of the defendants was unlawful. It would therefore indeed be in equitable to permit the defendants to take advantage of a new law enacted while an application for plat approval, valid when filed, has been unlawfully delayed. See Smith v. City of Clearwater, 383 So.2d 681 (Fla. App. 1980), petition dismissed, 403 So.2d 407 (Fla. 1981); Davidson v. City of Coral Gables, 119 So.2d 704 (Fla. App. 1960), cert. dismissed, 126 So.2d 739 (Fla. 1961).

Second, the district court's order of July 2, 1981 made "preliminary findings...that plaintiffs have complied with all of the Subdivision Regulations....and that the defendants must base their approval or disapproval...upon the regulations and requirements contained in the Subdivision Regulations." Since, however, the defendants had given no reason for their rejection of the application, as required by the Subdivision Regulations, the court gave the defendants the opporutnity, within 45 days, to again consider plaintiffs' application "within the guidelines set forth above." The clear language of the district court's order leaves no doubt that it did not intend to give the defendants carte blanche authority for a de novo review of plaintiffs' application. It simply gave the defendants the opportunity to

do what they were required to do in the first place, i.e., give the reason, if any, why the plaintiffs' application did not conform to the Subdivision Regulations. The district court's final order confirms this.

Finally, under the provisions of the ordinance which enacted the Manatee Plan, the new requirements of the Plan and its implementing regulations were not applicable to land use applications filed with the county prior to April 30, 1981, the effective date of the Plan.[9/] Pursuant to LGCPA, the Development Code implemented the Manatee Plan and is required to be consistent with it. Since the plaintiffs filed this plat application in February, 1980 they were grandfathered out of the new regulations in the Development Code.

For the foregoing reasons the district court was correct in rejecting the defendants' application of later enacted ordinances to deny plaintiffs' plat application.

9/ Section 4(c) of Ordinance No. 80-4 which enacted the Manatee Plan provides in pertinent part:

> Actions on applications for development permits which have been duly filed with the County of Manatee, its departments, or agencies, prior to the effective date of this ordinance shall not be subject to the prescriptive provisions of the Plan...

Section 4(b) of the Ordinance defines "prescriptive provisions" to include "land development regulations."

We now turn to the defendants' claim of error in the refusal of the district court to find that certain Florida statutory provisions authorized them to reject plaintiffs' plat application because of inadequate road access to the proposed subdivision, and because adequate school facilities were not available or planned to be constructed.

Defendants argue that Section 336.05(2) Florida Statutes[10/] gave them discretion, independently of the Subdivision Regulations, to deny the plat application because of the inferior condition of the Myakka-Wauchula County Road, the only access to the subdivision site. The district court held this to be an enabling statute rather than a source of discretion, and therefore their reliance upon discretion, rather than on uniform standards was improper. Moreover, the district court found unpersuasive the defendants' argument that because the proposed subdivision was not connected with a completed highway sufficient for the anticipated traffic it failed to comply with both the statutes and the Subdivision Regulations. The court found "access" in both contexts not to require a completed road in advance of development.

10/ See Footnote 5.

The Subdivision Regulations contain specific and detailed requirements pertaining to access to a subdivision. They do not impose any requirements regarding the condition of roads maintained by the county.[11/] In fact, they do not incorporate or in any way refer to any statutory provision. It is undisputed that the plaintiffs' proposed plat met the requirements of the Subdivision Regulations concerning access. Thus the narrow question is whether the statutes give the defendants discretion to deny a plat application because the connecting county road is, in their opinion, in a deteriorated and unsafe condition, even though the plat complies with the access requirements of the Subdivision Regulations. We agree with the district court that this is an enabling statute which would authorize a local government to establish specific land use standards, but it does not constitute an independent source of discretion. Were we to hold otherwise the statute would confer upon the defendants authority to grant plat approval to one and yet withhold it from another without guides of accountability, a result that would not meet the test of constitutionality. See, e.g.

11/ Paragraph F of the Subdivision Regulations provides:

"Access: No subdivision shall be approved unless its street system is connected to an arterial highway by a public road which is County or State maintained."

Harrington & Co., Inc. v. Tampa Port Authority, 358 So.2d 168 (Fla. 1978); Dickinson v. State, 227 So.2d 36 (Fla. 1969); North Bay Village v. Blackwell, 88 So.2d 524 (Fla. 1956); Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953); City of Naples v. Central Plaza of Naples, Inc., 303 So.2d 423 (Fla. App. 1974).

We are not unaware of the defendants' reliance on Chase Manhattan Mortgage & Realty Trust v. Wacha, 402 So.2d 61 (Fla. App. 1981), in which, without discussion, in an alternative holding, the court affirmed the denial of a site plan, without prejudice; "on the basis of inadequate access" under Section 336.05(2) Florida Statutes. There is no discussion of the relationship of this statute to any specific standards the county may have had regarding access, or the applicability of such statutes when specific subdivision regulations exist. There is also no discussion whether the rejected site complied with the specific access requirements. Under these circumstances we are unpersuaded that the statute gives the defendants independent discretion to interpret what is "adequate and safe" and impose ad hoc requirements regarding the condition of the county road adjacent to the proposed subdivision.

Similarly, the defendants, relying on Section 235.193 Florida Statutes,[12/] refused plaintiffs' plat application finding that the public school facilities were not adequate to serve the proposed development.

Without belaboring the point we reject this argument for the same reasons that we explicated concerning the "access" statute.

There was no genuine dispute of material fact regarding plaintiffs' compliance with the requirements of the Subdivision Regulations. Under these circumstances the defendants had an administrative duty to approve the plaintiffs' proposed plat and their refusal to do so was a violation of the plaintiffs' guarantee of due process. See Washington ex rel. Seattle Trust Title Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). The entry of summary judgment for the plaintiffs was proper.

AFFIRMED.

12/ See Footnote 6.

APPENDIX B

SOUTHERN COOPERATIVE DEVELOPMENT FUND, et al.,

Plaintiffs,

v.

LOUIS E. DRIGGERS, et al.,

Defendants.

No. 80-640 Civ T-K

United States District Court,
M. D. Florida
Tampa Division

Dec. 3, 1981

ORDER

KRENTZMAN, Chief Judge.

Plaintiffs bring this action alleging that their plat application for Long Creek subdivision was unlawfully denied by the Manatee County Commission.

Plaintiffs' motion for partial summary judgment, filed October 23, 1980, seeks judgment on Counts I and IV, brought pursuant to 42 U.S.C. § 1983 and the Florida constitution, respectively. Plaintiffs seek a declaration that defendants' denial of the plat was unconstitutional, and an injunction directing defendants to issue preliminary plat approval.

After a hearing on December 2, 1980, the Court entered its order on July 2, 1981 finding that the plaintiffs had apparently complied with all of the Subdivision Regulations except those waived by the County Planning Department and Planning Commission. The Court considered Broward County v. Narco Realty, Inc., 359 So.2d 509 (Fla. 4DCA 1978) to be controlling, and held that "Manatee County must base its approval or disapproval of plat applications upon the regulations and requirements contained in the Subdivision Regulations, and not upon any broad powers of discretion. As such, the County Commission does indeed act in an administrative, and not a discretionary, capacity." The Court gave the county 45 days in which to reconsider plaintiffs' plat application under the Subdivision Regulations. The Court gave notice that if defendants failed to carry out their administrative duties the Court would likely grant plaintiffs' motion for partial summary judgment.

The issue presented to the Court upon its renewed consideration of plaintiffs' motion is whether the county, in its denial of the plat application the second time, fulfilled its administrative duties. This requires determination as to which set of regulations should have been applied, and whether the county properly denied the application under those regulations.

Plaintiffs allege that their initial plat application was unlawfully denied by the county under the regulations in effect at the time. They claim that if it had been approved, it clearly would not be subject retroactively to new regulations. Therefore, they argue, it is a violation of due process to subject the plat to amended regulations. In addition, plaintiffs seek damages for the unlawful rejection of the plat.

The Court has already found that the county's rejection or approval of a plat application is an administrative act on the part of the county. Broward County v. Narco Realty, Inc., supra. The due process clause protects against arbitrary restriction of lawful use of land. Washington ex rel Seattle Title Trust Co. v. Roberg, 278 U.S. 116, 123, 49 S.Ct. 50, 52, 73 L.Ed. 210 (1928). Such considerations apply with particular force when the governmental body restricts lawful use of land while acting in administrative capacity. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

The Court finds that plaintiffs' rights would be violated if new regulations are used to deny a plat application which complied with the regulations in effect at the time the plat application was filed. This result is consistent with Florida law, which holds that the right of a plaintiff to recover must be measured by the facts as they exist when the suit is insti-

tuted. City of Coral Gables v. Sakolsky, 215 So.2d 329 (Fla. 3DCA 1968). The Court's direction to the county to reconsider the plat under "the Subdivision Regulations" in its July 2, 1981 order must be interpreted as referring to the old regulations.

For the above reasons the Court will review the county's rejection of the plat under the "old" regulations, which in this case are those which were in effect when the plat application was filed and when the case was instituted.

The reasons stated by the county for rejecting the plat under the old regulations are essentially the same reasons previously argued to the Court by defendants in response to the motion. Defendants' first basis of rejection is Florida Statute 366.05(2) which provides:

> The Commissioners are authorized to refuse to approve for recording any map or plat of a subdivision when recording of such plat would result in duplication of names of streets or roads or when said plat, in the opinion of said Commissioners, will not provide adequate and safe access or drainage.

The county argues that this statute gives it discretion to deny plats, independently of the Subdivision Regulations. The Court, however, reaffirms its holding set out in the July 2, 1981 order to the effect that the county has no discretion to deny plats which meet the requirements set out in the Subdivision Regulations. Statute 366.05(2) is an enabling statute

rather than a source of discretion, and reliance upon discretion rather than uniform standards is improper. Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Broward County v. Narco, supra.

Even if the county did possess such discretion, it has failed to show that the plat application does not comply with the statute, and therefore that its exercise of discretion was not arbitrary and capricious. The county contends that because the plat is not connected with a completed highway sufficient for the traffic anticipated as a result of plat completion, it fails to comply with the required "access" in both statute 366.05(2), and in paragraph F of the Subdivision Regulations, which provides: "Access: No subdivision shall be approved unless its street system is connected to an arterial highway by a public road which is County or State maintained." The Court finds "access" in both contexts not to require a completed road in advance of development, or, in effect, a cart before the horse.

The county cites, as other reasons for rejecting the plat, Florida Statute 235.193(4) which provides:

> The local governing body is empowered to reject development plans when public school facilities made necessary by the proposed development are not available in the area which is proposed for development or are not planned to be constructed in such area concurrently with the development.

and Sections 21 and 22 of the Manatee County Planning Act (exhibit B to plaintiffs' motion for partial summary judgment), which authorize the county to enact subdivision regulations and constitute a general statement of intent. For the same reasons that the Court found the statute on roads to be an inappropriate basis for plat rejection, the Court finds that these bases are not valid reasons for denial of the plat. More specifically, these statutes do not provide the county with discretion to reject plats which conform to the subdivision regulations; and the plat does not fail to meet the standards even if applied.

The Court, accordingly, finds that Manatee County's rejection of plantiffs' plat application was a violation of plaintiffs' federal and state constitutional rights to due process. Plaintiffs' motion for partial summary judgment as to Counts I and IV is GRANTED. Defendants are directed to issue preliminary plat approval for Long Creek subdivision. Defendants' cross motion for partial summary judgment, filed December 30, 1980, is DENIED.

Defendant Manatee County filed a counterclaim against plaitniffs as part of its answer on December 1980. The county then filed its "First Amendment" to the counterclaim on February 25, 1981, joining federal agency counterdefendants. The counterclaim alleges the need for an Environmental

Impact Statement (EIS), and asks for an injunction of plaintiffs' project plans until such EIS is filed.

The Amendment to the counterclaim does not comply with Local Rule 4.01, Middle District of Florida, which requires an amended pleading to be filed in its entirety, although it is otherwise procedurally appropriate. See McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976). However, the counterclaim is permissive to this lawsuit: it does not arise out of the transaction or occurrence that is the subject of this suit, Rule 13(b), Fed.R.Civ.P. The Court is of the opinion that separate trials would entail very little duplication of evidence and that the counterclaim unduly complicates this case. As such, the Court has discretion to dismiss it. See Wright & Miller, Sec. 1420 (1971). (But see 3 Moore, Fed.Prac. par. 13.18 at p. 13-459, although Moore agrees that the counterclaim may be served by the court. The Fifth Circuit has left the issue open. See Weems v. McCloud, 619 F.2d 1081, 1094, n.29 (5th Cir. 1980).) The counterclaim is DISMISSED, without prejudice. The federal counterdefendants' and plaintiffs' motions to dismiss the counterclaim are MOOT.

This case will proceed to trial on the remaining counts of the complaint and on damages under Counts I and IV. It will be separately noticed for status of case conference, at which a

date by which discovery will be completed and dates for pre-trial conference and trial will be determined and set.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SOUTHERN COOPERATIVE DEVELOPMENT FUND, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. 80-640 Civ. T-K
LOUIS E. DRIGGERS, et al.,	)	
Defendants.	)	

ORDER

Hearing was held herein on December 2, 1980, on plaintiffs' motion for partial summary judgment and on defendants' motion to dismiss. At the close of said hearing the Court denied the defendants' motion to dismiss and took the plaintiffs' motion for partial summary judgment under advisement.

The plaintiffs' motion for partial judgment, filed on October 23, 1980, seeks judgment as to Counts I and IV of the complaint. In Count I plaintiffs contend that defendants' failure to approve their application for preliminary plat was unlawful, arbitrary, and in general violation of 42 U.S.C.

§1983. Count IV contends virtually the same, but with relation to the Florida Constitution and statutes, stating that the plat disapproval was unconstitutional thereunder.

It is not necessary at the present time to recite in detail the factual history of this case. Basically, and as the record indicates, both the Manatee County Planning Department and the Manatee County Planning Commission recommended to the Manatee County Commission that preliminary plat approval be granted to plaintiffs' project, specifically finding, with three exceptions, that the proposed project met the requirements of the Manatee County Subdivision Regulations (Exhibit A of plaintiffs' motion for partial summary judgment). Those Regulations were enacted pursuant to the Manatee County Planning Act, Chapter 63-1559, Special Acts of Florida, which is attached to plaintiffs' motion for partial summary judgment as Exhibit B.

The Court makes the following preliminary findings. Section 23 of the Manatee County Planning Act requires the "Governing Body," here the County Commission, to specifically state the reasons for disapproval if a subdivision plat or proposal is not approved. In this case, the County Commission failed to make specific findings in relation to the guidelines by the Manatee County Subdivision Regulations.

Secondly, it appears that this case is governed by Broward County v. Narco Realty, Inc., 359 So.2d 509 (Fla. 4th DCA, 1978), which held that Broward County had no discretion to refuse plat approval where the landowner had met all legal requirements for platting land. No relevant distinctions appear between this case and that involving Broward County. Manatee County must base its approval or disapproval of plat applications upon the regulations and requirements contained in the Subdivision Regulations, and not upon any broad powers of discretion. As such, the County Commission does indeed act in an administrative, and not a discretionary, capacity.

Because the County Commission did not articulate its reasons for disapproving plaintiffs' application, and because it does indeed appear from the record that the disapproval may have been based upon criteria not contained in the Subdivision Regulations, the County Commission should be and is afforded the opportunity to again consider plaintiffs' plat application within the guidelines set forth above. The Court notes that it appears that plaintiffs have complied with all of the Subdivision Regulations except those that were deemed waived by the County Planning Department and the County Planning Commission. Those waivers relate to the sidewalk, recreation, and fire protection requirements. See Exhibit C to plaintiffs'

motion for partial summary judgment. But for these requirements or other valid reasons contained in the Subdivision Regulations, the County Commission possesses no discretion to refuse plaintiffs' application.

The Court DEFERS final consideration of plaintiffs' motion for partial summary judgment at this time. If after forty-five (45) days of the date of this order defendants have failed to comply with the provisions herein and to perform their administrative duty under the Manatee County Planning Act and the Manatee County Subdivision Regulations, this Court will, upon further application by plaintiffs, likely grant plaintiffs' motion for partial summary judgment.

The Court notes that additional motions have been filed since the December 2 hearing. If the appropriate party has not yet responded to each motion, they are directed so to do. The Clerk is directed to schedule a hearing on all pending motions for a date soon after September 1, 1981. At that time the Court will also consider any further matters relating to plaintiffs' motion for partial summary judgment.

IT IS SO ORDERED at Tampa, Florida this 1st day of July, 1981.

/S/
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

EXCERPTS FROM TRANSCRIPT OF THE MEETING OF THE BOARD OF COUNTY COMMISSIONERS OF MANATEE COUNTY ON MARCH 27, 1980

Page 30:

"Some of these families moving in, we are taxpayers and have been paying for services out there we haven't really received. We're going to get another four-eight families out there, and the indications are that we've heard all, I can't say for hear-says, but the minority groups, some of them probably haven't been paying taxes and everyone of us is footing the bill for that and it bothers me just a little bit that more people would come in and demand extra services that the County can't extend and would need extra services."

Page 37:

"Who is paying these bills that the lady is talking about? We could care less who the minority is. Maybe those who are sitting in this room today is the minority. Who is paying the taxes?"

APPENDIX E

EXCERPTS FROM
DEPOSITION OF CLAUDE E. McGAVIC
TAKEN AUGUST 26, 1980

Page 141:

(Examination by Mr. Ottenweller)

"Q Are there areas of Manatee County which are predominantly black?

Page 142:

A Yes, there are.

Q Could you identify some of those?

A The community of Tallavast; the community of Parrish; Washington Park and its surrounding area in Palmetto; East Bradenton; the community of Rubonia are parts of the primary locations. Have I missed any?"

APPENDIX F

EXCERPTS FROM DEPOSITION OF LOUIS E. DRIGGERS TAKEN AUGUST 20, 1980

Page 145:

(Examination by Mr. Jones)

"Q And what about with respect to the proposal location of the Parrish project near or in Oneco, I guess. What — would that also be a middle income neighborhood?

A Oneco?

Q Yes.

A You mentioned two areas, now, Parrish and Oneco, two separate —

Q Oh, I'm sorry. I mean to refer to the location of the proposed Parrish farm labor project.

A Okay.

Q On First Street in Parrish. I'm sorry.

A Okay. That's a mixed neighborhood with both white and blacks living in the area. I'd say again, middle to low income."